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FORUM: LABOR LAW REFORM

INTRODUCTION

Legislative efforts to amend the National Labor Relations Act¹ typically produce extensive and heated debate. The recent efforts to pass the Labor Law Reform Act of 1978 proved no exception. The debates over the proposed Act highlighted the conflicting positions of management and labor with respect to how our national labor laws should function.

By way of background, on July 19, 1977 identical labor law reform bills were introduced in the House and Senate.² H.R. 8410, as amended, was passed by the House on October 6, 1977.³ The Senate began debating S. 2467 on May 16, 1978.⁴ After a long and successful filibuster by the opponents of the bill, S. 2467 was recommitted to the Senate Human Resources Committee on June 22, 1978.⁵ That recommitment marked the end of any attempt by the 95th Congress to reform the nation's labor laws.

By failing to enact a labor law reform bill, the 95th Congress left important issues unresolved. These issues no doubt will reappear in future debates as to the wisdom of pursuing changes in the National Labor Relations Act. This Forum will address, from both a management and a labor perspective, certain of the significant issues which the bills raised. The management position will be argued by Mr. Andrew M. Kramer, the labor position by Mr. Elliot Bredhoff. Messrs. Kramer and Bredhoff have selected three issues for mutual discussion — equal access, injunctive relief against strikes and picketing, and the make-whole remedy.

The first issue, equal access, deals with the circumstances under which unions may gain access to an employer's property to communicate with his

¹ 29 U.S.C. §§ 141-187 (1976).

² H.R. 8410, 95th Cong., 1st Sess., 123 CONG. REC. H7388-91 (daily ed. July 19, 1977); S. 1883, 95th Cong., 1st Sess., 123 CONG. REC. S12355-63 (daily ed. July 19, 1977). S. 1883 was amended and renumbered in committee, and on January 31, 1978 it was introduced as S. 2467 to the Senate as a whole. 124 CONG. REC. S874 (daily ed. Jan. 31, 1978).

Hearings on H.R. 8410 commenced on July 25, 1977, 123 CONG. REC. D1125 (daily ed. July 25, 1977), and concluded on September 15, 1977. 123 CONG. REC. D1285 (daily ed. Sept. 15, 1977). *Hearings on H.R. 8410 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. (1977).

³ 123 CONG. REC. H10702-14 (daily ed. Oct. 6, 1977).

⁴ 124 CONG. REC. S7525 (daily ed. May 16, 1978).

⁵ 124 CONG. REC. S9410 (daily ed. June 22, 1978).

employees concerning union representation. Presently, union organizers have no general right of access, even when an employer chooses to address his employees on union matters.⁶ Both H.R. 8410 and S. 2467 provided that if an employer addresses his employees on company property while employees are seeking representation by a union, union organizers may have access to the employer's property to convey their message to employees in an equivalent manner.⁷

The second issue selected for discussion, injunctive relief, deals with the appropriateness of injunctive relief when unions strike despite the presence of a collectively-bargained no-strike clause. Employers presently may obtain injunctive relief when unions strike over arbitrable grievances.⁸ As recently decided by the Supreme Court in *Buffalo Forge Co. v. United Steelworkers*,⁹ however, no such injunctive relief is available when unions strike over matters which they have not agreed to arbitrate — such as when unions engage in a sympathy strike in support of another union.¹⁰ Both H.R. 8410 and S. 2467 addressed to some extent the inability of employers to obtain injunctions in such situations. Under H.R. 8410, the National Labor Relations Board would have been given authority to seek injunctive relief against strikes that violate express or implied no-strike clauses, and that are not authorized by a labor organization representing employees of the employer being struck.¹¹ Under S. 2467, an employer, rather than the Board, would have been authorized to seek injunctive relief when his employees, in violation of a no-strike clause, either refuse to cross a picket line not maintained by a labor organization in connection with a labor dispute, or engage in a strike that is not initiated, authorized, or ratified by the union representing the striking employees, where a refusal to cross a picket line is not involved.¹² However, neither bill contained a blanket authorization for injunctions against all strikes conducted where a collectively-bargained no-strike clause is in effect.

The final issue selected by Messrs. Kramer and Bredhoff for discussion, the make-whole remedy, concerns the remedial power of the Board to grant retroactive compensation to employees when an employer unlawfully refuses to bargain in a first contract situation. A divided Board ruled, in *Ex-Cell-O Corp.*,¹³ that retroactive compensation is not available to bargaining unit

⁶ *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 33 L.R.R.M. 1156 (1953).

⁷ H.R. 8410, 95th Cong., 1st Sess. § 3, 123 CONG. REC. H10632-48 (daily ed. Oct. 5, 1977); S. 2467, 95th Cong., 2d Sess. § 4, 124 CONG. REC. S7526 (daily ed. May 16, 1978). The full text of the equal access provisions of H.R. 8410 and S. 2467 may be found at Kramer, *infra* this issue, note 2.

⁸ *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 247 (1970).

⁹ 428 U.S. 397 (1976).

¹⁰ *Id.* at 407-13.

¹¹ H.R. 8410, 95th Cong., 1st Sess. § 12, 123 CONG. REC. H10710 (daily ed. Oct. 6, 1977). The full text of the injunctive relief provision of H.R. 8410 may be found at Kramer, *infra* this issue, note 94.

¹² S. 2467, 95th Cong., 2d Sess. § 13, 124 CONG. REC. S7528 (daily ed. May 16, 1978). The full text of the injunctive relief provision of S. 2467 may be found at Kramer, *infra* this issue, note 95.

¹³ 185 N.L.R.B. 107, 74 L.R.R.M. 1740 (1970), *enforced*, 449 F.2d 1058, 77 L.R.R.M. 2547 (D.C. Cir. 1971).

employees for losses caused by an employer's unlawful refusal to bargain.¹⁴ Both H.R. 8410 and S. 2467 would have overruled *Ex-Cell-O* by allowing the Board to grant such a make-whole remedy.¹⁵

The discussion of these three issues by Messrs. Kramer and Bredhoff clearly illustrates the conflicting positions of management and labor. It is hoped that their critique of the defeated reform bills and their recommendations for future legislation will be of value to the 96th Congress as it considers new proposals for labor law reform.

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¹⁴ 185 N.L.R.B. at 110, 74 L.R.R.M. at 1743.

¹⁵ H.R. 8410, 95th Cong., 1st Sess. § 8, 123 CONG. REC. H10676-77, H10702-06 (daily eds. Oct. 5-6, 1977); S. 2467, 95th Cong., 2d Sess. § 9, 124 CONG. REC. S7527 (daily ed. May 16, 1978). The full text of the make-whole provisions of H.R. 8410 and S. 2467 may be found at Kramer, *infra* this issue, note 117.